but the serious flaws in his work, as discussed above and elaborated more fully in the reports and testimony of Professors Olson and Donovan, undermine it so as to render it worthless. Mr. Snyder's testimony must be excluded.

It is uncontested that Professors Olson and Donovan have submitted evidence in compliance with Fed. R. Evid. 702.

2. Other Testimony

The testimony of the Democratic Party's witnesses – Paul Berendt, Blair Butterworth, and Don McConough – and the exhibits submitted with their declarations; the testimony of the Republican Party's witnesses – Christopher Vance, Dale Foreman, John Meyers, and Thomas Lowry – and the exhibits submitted with their declarations, are the subject of motions to strike made by the Secretary of State. The State argues that this testimony must be excluded because it includes opinions, and these witnesses were not designated as experts, nor were the required disclosures made pursuant to Fed. R. Civ. P. 26(b)(4) and Local CR 26(a)(2); their testimony is thus rendered inadmissible under Fed. R. Evid 702. Moreover, their opinions and conclusions are not supported by detailed supporting data. The State also argues that these witnesses may not give opinions based on "scientific, technical, or other specialized knowledge" as lay witnesses under Fed. R. Evid. 701. Finally, the State argues that the opinions lack foundation, appear to be based upon hearsay, in part, or are simple conclusions, or are speculative. Regarding Thomas Lowry's testimony, the State argues that his description of his candidacy and the reasons for it are irrelevant.

The Democratic Party argues that their witnesses were available for deposition, they were disclosed as experts, citing that they may produce evidence under Fed. R. Evid 702, 703, or 705, and that they were not required to produce the additional disclosure that is required by Fed. R. Civ. P. 26(a)(2)(B) because these witnesses were not "retained" or "specially employed" to provide expert testimony. The Republican Party makes a similar argument.

a. Expert Opinion – FRE 702 and Fed. R. Civ. P. 26(a)(2)(B)

The point of Fed. R. Civ. P. 26(a)(2)(B)'s requirement of a written report for testifying expert witnesses is to provide more substantive information as an aid in preparation to depose the expert. This requirement does not turn on whether the witness is paid a fee. "Rule 26 focuses not on the status of the witness but rather on the substance of the testimony." *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996). The political parties' arguments on Rule 26's requirements are not well taken.

The declarations of the above-referenced witnesses include opinions that the outcomes of elections have been changed because the votes of "true believers" were diluted by the votes of non-party members, that the parties' political message is altered or adulterated by the blanket primary, that candidates elected under the blanket primary are "philosophically different," that the blanket primary increases the cost of primary election campaigns, and that the blanket primary "disillusions" party regulars and decreases their commitment to party activities. (See State's Response at 9 and citations to declarations therein) Much of the substance of these witnesses' testimony was addressed in the expert testimony of Professors Donovan and Olson, who are qualified to give such opinions, and the basis for their opinions is also known. The above-listed witnesses predicate their opinions on technical or other specialized knowledge that they have gained throughout the course of their service in the political parties' hierarchies or their careers as political consultants. The Court must carefully scrutinize testimony based on such experience:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *The trial courts' gate keeper function requires more than taking the experts' word for it.*

KW Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001)(emphasis in original). The political parties' witnesses listed at the beginning of this section do not survive careful scrutiny. There is no data analyzed, no disclosure of methods employed, nor factual bases

for their opinions disclosed. The Court declines to accept the above-referenced witnesses' testimony as opinion testimony from experts.

b. Lay Opinion Testimony – FRE 701

The political parties argue that the subject declarations from past and current party officials and their political consultants may be admitted as lay opinion testimony under Fed. R. Evid. 701, which provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The Advisory Committee Notes to the 2000 Amendments explain the import of this Rule:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996)(noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the *expert disclosure and discovery process*")

A review of the Declarations of the above-listed (Section 2 above) political party witnesses reveals that these witnesses are not simply testifying to ordinary matters within the realm of common experience, such as the appearance of persons or things, but these witnesses are giving their opinions, based on their purported experience and specialized knowledge, about the ultimate issues in the case: whether the blanket primary has caused harm to the political parties. Such testimony is improper lay opinion. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996)(lay opinion testimony proper only if opinion and inferences do not require any specialized

knowledge and could be reached by ordinary persons). The danger here is that rather than the factual underpinnings consisting of empirical data, the witnesses' conclusions are supported by their experience (an amorphous matter in most cases), isolated anecdotal evidence, or belief. This kind of evidence going to critical aspects of this case does not make for proper opinion testimony – lay or expert – and it must be excluded. *See Hestor v. BIC Corp.*, 225 F.3d 178, 182 (2d Cir. 2000).

3. Insufficient Evidence of Burden

Even if one were to accept Mr. Snyder's report and the unobjectionable aspects of the political parties' lay witnesses' testimony, there is insufficient evidence to rebut the testimony of Professors Donovan and Olson. The Court would weigh the Snyder report against the professors' testimony and find that its infirmities rendered it worthless. Similarly, the Court would consider the political parties' other witnesses' testimony and find it to be insubstantial and wholly insufficient in the face of the professors' testimony.

There is before the Court, nevertheless, other evidence that is competent on the issue of whether there is a substantial burden to the political parties' associational rights, and this evidence demonstrates that there is no such burden. Professor Olson stated that while there may be effects of the blanket primary, he did not agree with the political parties as to the magnitude, the frequency, the scope of the effects, or whether they constitute "burdens" on the parties. Professor Olson also thought that there may not actually be a burden on the political party, because it may benefit by having candidates selected who may actually be more likely to win the general election. (Decl. of David J. Olson, p. 3, ¶ 7; and *see generally,* Olson Statement, competition for votes, pp. 5 & 6) Professor Olson stated that there is no legal or organizational basis for determining party membership; in the absence of party registration, state party membership is a matter of psychological identification. (Olson Decl. ¶ 11; Statement of David J. Olson, p. 4)

Professor Olson reviewed the harms and burdens that the opponents of the blanket primary have alleged and compared these with empirical studies by political scientists. (See discussion at pages 5-11 of Professor Olson's Statement.) He explained that political scientists view political parties as composed of three elements: (1) the party as organization, (2) the party in government, and (3) the party in the electorate. As to the party as organization, citing the findings of several studies of the subject, Professor Olson concluded that the alleged harms and burdens inflicted upon political parties in Washington are without foundation. (Olson Statement, pp. 5-13)

> The empirical findings on the strength of parties as organizations may be summarized: Washington political parties successfully sustain a wide range of activities, rank high nationally on measures of organizational strength, are among the most two-party competitive in the nation, are active in raising money for candidates and remain the single most important agency for recruiting and promoting candidates for public office.

(Olson Statement, p. 7)

As to the "Party in Government," while Paul Berendt (Chair of the Washington State Democratic Central Committee) opines that elected officials selected through a blanket primary "give low or no priority" to party goals (Berendt Decl. p. 4, ll. 11-23), Professor Olson found this contention to be "absurd," because "Party is the single best predictor of how officials behave once in office." (Olson Decl. ¶ 15; Olson Statement, (citing a study) p. 8) Furthermore, Professor Olson discussed how the "Parties in Government" exercise power in a coordinated way. From a detailed discussion, he concludes:

> From the above, in Washington State it is the party in government that organizes the legislature and decides on leadership hierarchies, sets the agenda, enforces party cohesion, and creates the LCCs [legislative campaign committees] for fund raising *and other campaign support activities.*

(Olson Statement, p. 9)

In beginning his discussion of the "Party in the Electorate," Professor Olson cites the parties' criticisms of the blanket primary: the "pernicious effects" of cross-over voting with malicious intent and the filing of phony candidates. (Olson Statement, p. 9) He notes that there are

broad, secular trends across the 50 states, such as the rise of candidate-centered campaigns, the consequences of which must be distinguished from effects attributable to the blanket primary, per se. He notes that party loyalties in the electorate across the United States and in Washington are weaker, and that there has been a rise in the use of legislative campaign committees (LCCs), PACs and independent expenditure groups as a partial replacement of political parties' roles. *Id.* Nevertheless, studies show that "The distribution of party loyalties in Washington generally resembles national patterns." *Id.* Professor Olson concludes further:

> *It may then be said that the two parties hold issue positions at substantial variance* with each other, they recruit candidates reflective of those issue positions, and once elected, partisan members of the legislative bodies significantly reflect the different positions represented by the parties and distributed through the electorate.

(Olson Statement, p. 10) Studies also conclude that cross-over voting with malicious intent simply does not occur. "There has been little evidence in the state of Washington of 'raiding' by regulars of the opposition party in order to secure the nomination of a candidate felt to be a weaker opponent." *Id.* Such a strategy, sophisticated though it is, is equally available in all direct primaries, whether of the closed, open, or blanket variety. (*See* Olson Statement, 10, 11) The parties speak often of their message being diluted by competing for votes across the whole electorate in the blanket primary. There is, however, a larger interest at stake: "Voters who note the disjunction between message content in the primary versus general election raise questions about candidates' sincerity, and which positions they really advocate." (*Id.* at 11)

Absent a means of identifying voters' political party affiliation, there is no way to determine that cross-over voting has occurred. The Grange points out that the Supreme Court cited the Ninth Circuit's definition of cross-over voting (See *California Democratic Party* 530 U.S. at 579 n. 9), and that when Professor Olson was asked whether in Washington there were cross-over voters defined as one voting in a party to which they are not registered, Professor Olson answered "No."

(Olson Dep. p.107-8) This was the only possible answer, as there is no registration of voters by party in Washington.

Professor Donovan addressed the blanket primary's influence on public attitudes toward political parties. He stated: "Survey data suggest that voter attachments to parties, and partisan behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (Donovan Report p. 1) He continued: "A body of empirical work documents that public evaluations of political institutions are enhanced by electoral arrangements that allow voters more, rather than less, direct political participation." *Id.*

Professor Donovan also points out that while the political parties complain that they did not prefer some candidates who actually captured the party's nominations, "there is no data provided, however, that establishes that the party's self-identified voters did not prefer these candidates." (Donovan Supp. Decl. p. 11)

A concrete example given by Professor Donovan is Jennifer Dunn's campaign for Congress in 1992. The Republicans claim, through Mr. Meyers (former Executive Director of the Washington State Republican Party, and a consultant since 1993), that there was harm to the party in the way that she sought broad support in the primary. (Meyers Decl. p. 4) Professor Donovan pointed out that "No data or evidence is provided to establish that Dunn was not the nominee preferred by actual Republican voters in her 8th District. No evidence is provided that establishes that cross-over voting affected the outcome of this race." (Donovan Supp. Decl. p. 12)

Another example advanced by the Republican Party is the Louisiana primary where David Duke ran as a Republican and won. (See Vance Decl. p. 6) The Louisiana system was the one cited by Justice Scalia as a permissible nonpartisan blanket primary where the top two (or however many a state prescribes) vote getters move on to the general election. (See Donovan Supp. Decl. p. 12) Professor Donovan notes that the Vance Declaration provided no evidence that Duke was not the preferred candidate of actual Republican voters, and noted additionally that analysis of surveys

conducted in the 1991 Louisiana Gubernatorial runoff election found that Republicans were significantly more likely to vote for Duke than Democrats. *Id.*

The Democrats submit that the nomination of Democrat Dixy Lee Ray for the office of Governor *in 1976 occurred only because Republicans, independents, and other non-Democrats cast* votes for Ms. Ray in the 1976 primary. (Dem. Mot. At 11, with ref. to Olson and Butterworth Deps. and Butterworth Decl.) Apart from Butterworth's mere assertion, however, there is no evidence of this fact.

The political parties' evidence that there is a burden on their constitutional right of association is, for the most part, incompetent and inadmissible, and at best, it is insubstantial and speculative; the political parties have failed to carry their burden of proof.

IV. CONCLUSION

The political parties have not demonstrated that there is evidence of a substantial burden to their First Amendment right of association. Accordingly, the motions of the Democratic Party and the Republican Party must be denied.

The Defendants Secretary of State and the Grange have demonstrated that Washington's blanket primary is a constitutional exercise of the State's power to regulate elections, as they have shown that the political parties have failed to come forth with sufficient evidence to prove the blanket primary's unconstitutionality. Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The State has shown that the political parties have failed to demonstrate the element of burden on their constitutional right of association. Accordingly, the State's motion for summary judgment must be granted.

NOW, THEREFORE,

///////

///////

IT IS ORDERED:

1. Motion of Defendant Sam S. Reed, as Secretary of State of Washington for Summary Judgment (Doc. # 268) is GRANTED;

2. Motion of Plaintiff Washington State Democratic Party for Summary Judgment (Doc. #261) is DENIED;

3. Motion of Intervenor Republican State Committee of Washington for Summary Judgment (Doc. # 273) is DENIED;

4. The following Motions of Defendant Reed to Strike are GRANTED:

   a. Strike Declarations Submitted on behalf of Washington State Democratic Party's Motion for Summary Judgment (Doc. # 289)

   b. Strike Declarations Submitted on behalf of Republican Intervenors' Motion for Summary Judgment (Doc. # 290) and

   c. *Strike Declaration of Michael Snyder and Expert Report and Attachments* (Doc. # 291)

5. This cause of action is DISMISSED, and the Clerk of the Court shall enter JUDGMENT in favor of Defendants.

DATED this 21 day of March, 2002.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

ec

United States District Court
for the
Western District of Washington
March 27, 2002

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:00-cv-05419

True and correct copies of the attached were mailed by the clerk to the *following:*

Fredric C Tausend, Esq.
PRESTON GATES & ELLIS
STE 5000
701 5TH AVE
SEATTLE, WA 98104-7078
FAX 623-7022

David T McDonald, Esq.
PRESTON GATES & ELLIS
STE 5000
701 5TH AVE
SEATTLE, WA 98104-7078
FAX 224-7095

Robert W Ferguson, Esq.
PRESTON GATES & ELLIS
STE 5000
701 5TH AVE
SEATTLE, WA 98104-7078
FAX 623-7022

James A Goeke, Esq.
PRESTON GATES & ELLIS
STE 5000
701 5TH AVE
SEATTLE, WA 98104-7078
206-623-7580

Jeffrey T Even, Esq.
ATTORNEY GENERAL'S OFFICE
PO BOX 40100
OLYMPIA, WA 98504-0100
FAX 1-360-664-2963

John J White Jr, Esq.
LIVENGOOD, CARTER, TJOSSEM, FITZGERALD & ALSKOG
PO BOX 908
KIRKLAND, WA 98083-0908
FAX 425-828-0908

Richard Dale Shepard, Esq.
SHEPARD LAW OFFICE INC
STE 200
818 S YAKIMA ST
TACOMA, WA 98405

James Martin Johnson, Esq.
JAMES M JOHNSON
STE 225
1110 S CAPITOL WY
OLYMPIA, WA 98501
FAX 1-360-357-5779

James Kendrick Pharris, Esq.
ATTORNEY GENERAL'S OFFICE
PO BOX 40100
OLYMPIA, WA 98504-0100
FAX 1-360-664-2963

Christine O'Grady Gregoire, Esq.
ATTORNEY GENERAL'S OFFICE
PO BOX 40100
OLYMPIA, WA 98504-0100

Frederick W. Hyde Jr., Esq.
STE 100
4710 UNIVERSITY WAY NE
SEATTLE, WA 98105-4428
FAX 264-5256

Jerome Richard Cronk, Esq.
17544 MIDVALE AVE N
107 SHORELINE BUS & PROF
SEATTLE, WA 98133
206-542-3181

FDB